

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

IN RE: GRAND JURY SUBPOENA .
OF MATTHEW COOPER .
 .
 . Docket No. MS 04-296
 .
 . Washington, D.C.
 August 6, 2004

TRANSCRIPT OF MOTION HEARING
BEFORE THE HONORABLE CHIEF JUDGE THOMAS HOGAN
UNITED STATES DISTRICT JUDGE

APPEARANCES:

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Washington, D.C. 20001

Proceedings recorded by machine shorthand, transcript
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1 THE COURT: All right. Call the case,
2 please.

3 THE DEPUTY CLERK: This is In Re: Special
4 Investigations MS Number 04-296. Parties come forward
5 and identify yourselves for the record, please.

6 MR. FITZGERALD: Good morning, Your Honor.
7 Patrick Fitzgerald, Special Counsel joined by Jim
8 Fleissner, Deputy Special Counsel. Also in attendance
9 is Special Agent Jack Eckenrod of the FBI.

10 THE COURT: All right. Thank you.

11 MR. ABRAMS: Good morning, Your Honor. I'm
12 Floyd Abrams. Sitting in back of me at counsel table
13 is Matthew Cooper of Time magazine. Across the table
14 is Joel Kurtzberg of my firm and Robin Bierstedt for
15 Time, Inc.

16 THE COURT: All right. Thank you.

17 This matter is before the Court on a motion
18 of the government for entry of a show cause order
19 which I had granted. And then today is the hearing
20 why the witness should not be been held in contempt of
21 court. I asked Mr. Cooper to be here personally, he
22 is and I appreciate that.

23 I received last evening, although I thought
24 the agreement was we'd get it on Wednesday, the
25 response of Mr. Cooper and the attached affidavits of

1 various individuals involved in this type of activity
2 of the reporting nature, the reporter's privilege
3 exceptor. I have not read all the cases cited since I
4 got this about 5:30 last night.

5 I want to raise with the parties one issue
6 that concerned me resulting in an experience I had
7 here several years in the Circuit. And that is the
8 agreement that Mr. Cooper would not have to appear and
9 actually refuse to answer any questions before the
10 Grand Jury because they have agreed between counsel
11 and Mr. Cooper that he would not answer questions.
12 And so they would proceed more traditionally by this
13 hearing today on the premise that he would not answer
14 questions.

15 Looking at the 1826 under Title 28, and I
16 read it through. It says that, "Whenever a witness in
17 any proceeding to a Grand Jury refuses to without just
18 cause to comply with an order of the Court to testify
19 the Court upon such refusal," and maybe this is
20 enough, "or when such refusal is brought to its
21 attention may summarily order its confinement," et
22 cetera. Which seems to envision that the witness must
23 actually have refused to testify in this Grand Jury.

24 And that, and I have to find there's no
25 valid basis for refusal to testify. With the subpoena

1 I ordered the witness to comply which I have. And the
2 witness disobeys that order by refusing to testify. I
3 just want to make sure that the parties are saying
4 that that is an appropriate approach by having an
5 agreement not to testify as opposed to actually
6 appearing and refusing to testify.

7 MR. FITZGERALD: Your Honor, I might may
8 make two suggestions. I understood Mr. Abrams
9 represented, and I obviously fully trust that
10 representation, that he had talked to his client who
11 indicated he would refuse to testify to the
12 appropriate questions. The two alternatives if we
13 wanted to make it rock solid, we do have Grand Jury
14 time available this afternoon. We can go in and I
15 think probably in one question ask the question that I
16 understand from Mr. Cooper's representations that
17 Mr. Abrams would refuse to testify. Or the Court
18 would ask Mr. Cooper now as this is a civil proceeding
19 would he answer a question and he could state his
20 intent to refuse --

21 THE COURT: I intend to do that at least.
22 My concern was I had a case several years ago
23 involving privileges, different privilege and massive
24 documents that, and the parties needed the privilege
25 issue resolved before trial. And the documents were

1 multiple, multitude of documents. And the parties
2 stipulate that I could make a generic ruling on
3 whether this privilege would attach to the documents
4 or not, although some documents may not cover the
5 privilege, but they needed an immediate ruling. And I
6 did so by agreement. It was appealed. New counsel
7 came in for the losing side and said there had to be
8 an individual document viewing. The Circuit agreed
9 with that and sent it back down despite the original
10 agreement of the parties.

11 I did not want to see anybody lose time by
12 when the Circuit was set. This was just a prospective
13 refusal not a real refusal. Make sure we have a case
14 that the parties are satisfied, can raise the issues
15 as they want it raised in the time frames they have
16 without wasting time. That's all. I'm not opposed to
17 accepting the stipulation. I just want to lay it out
18 for the parties and make sure they're satisfied with
19 it.

20 MR. FITZGERALD: I appreciate that. We were
21 trying as well not to go through needless steps, but
22 we certainly don't want to go through an appeal and
23 turnaround and come back. I might suggests that
24 either we could have mister, if Mr. Abrams is
25 comfortable with it, Mr. Cooper state that if he were

1 asked a question about any confidential conversations
2 he had with the identified branch official,
3 off-the-record conversations concerning the topic
4 matter of whether he'd answered the question. And
5 then since I do have Grand Jury time at one o'clock
6 if, assuming parties are available I could ask that
7 simple question this afternoon. And presuming that he
8 refuses to answer we could report that back to the
9 Court if we wanted to be extra safe.

10 THE COURT: I think at least today and I'll
11 hear from Mr. Abrams on his advice about it as well, I
12 can consider the, the contempt go on and make a
13 decision on that. And if there's, parties agree to
14 tie that down and have Mr. Cooper go before the Grand
15 Jury and refuse to answer at one o'clock, that's fine.
16 But I just want to let the parties know the reading of
17 the statute in which my powers is vested pretty
18 clearly states I think contemplates a refusal to
19 answer on such refusal or when a refusal is brought to
20 its attention whether the stipulation the parties are
21 satisfied carries the weight they want. I'm willing
22 to go forward. I just thought we should just look at
23 that. Abrams.

24 MR. ABRAMS: Good morning, Your Honor.

25 THE COURT: Good morning.

1 MR. ABRAMS: When Mr. Fitzgerald raised with
2 me the possibility of doing this by stipulation it did
3 seem to me, it does seem to me particularly with
4 Mr. Cooper here in court to affirm if that's necessary
5 that he would refuse to answer the question that
6 Mr. Fitzgerald just placed on the record. I think
7 that should suffice. I think my saying should also
8 and it will preclude me from saying anything contrary
9 to that in the Court of Appeals. Put it differently,
10 I am not going to argue in the Court of Appeals that
11 that part of Section 1826 has not been met. So I
12 think that such refusal has been brought to your
13 attention.

14 THE COURT: That's fine. I think what I'll
15 do is ask Mr. Cooper on the record here and proceed.

16 MR. ABRAMS: Shall we do that now, Your
17 Honor.

18 THE COURT: Mr. Cooper, I'll ask you to come
19 up to the podium here if you don't mind, sir, make a
20 court appearance. Would you identify yourself for the
21 record, please.

22 THE WITNESS: Sure. My name is Matthew
23 Cooper.

24 THE COURT: All right. And you're the
25 Matthew Cooper the order is outstanding against to

1 show cause why you shouldn't be held in contempt for
2 refusing to testify before the Grand Jury on areas
3 concerning the off-the-record or confidential
4 conversations you may have had with people in the
5 executive branch about a subject matter this Grand
6 Jury is investigating?

7 THE WITNESS: That's correct, Your Honor.

8 THE COURT: All right. And I've been given
9 a stipulation to understand that you have and would
10 refuse to answer any questions about that subject
11 matter, about confidential off-the-record information
12 you may have before the Grand Jury; is that correct?

13 THE WITNESS: That's correct, Your Honor. I
14 want to try to get my process going. Yes, that's
15 true, Your Honor. Yes.

16 THE COURT: All right. I'm going to find
17 that you have been brought to my attention under 28
18 U.S.C 1826 that you have refused and will continue to
19 refuse to answer questions propounded by the Grand
20 Jury or the Special Counsel before the Grand Jury as
21 to the area in which they're investigating that this
22 matter concerns and the subpoena concerns that you're
23 brought in on.

24 All right. Thank you, Mr. Cooper.

25 THE WITNESS: Thank you.

1 THE COURT: Let me hear then on the merits
2 of this matter and the legal standard as to the
3 recalcitrant witness statute. I read through the
4 brief just submitted as to the type of discretion I
5 have not to find Mr. Cooper in contempt or if I do,
6 impose a fine rather than imprisonment or stay any
7 imprisonment order such as the decision of the Court.

8 And, Mr. Abrams, you want to expand on that
9 now?

10 MR. ABRAMS: Yes, Your Honor. Let me say
11 first that I apologize if there was any
12 misunderstanding as to when our brief would be filed.
13 I had understood it was Wednesday or Thursday;
14 therefore, I chose Thursday.

15 As Your Honor sees from our brief there's no
16 disagreement on the facts of this situation. Your
17 Honor has entered an order. Mr. Cooper has advised
18 you that consistent with what he understands the law
19 to be and his journalistic principles that he cannot
20 obey it and he has not. What we have argued as you
21 have seen in our brief, very briefly, that Your Honor
22 has a level of discretion about what to do today in a
23 variety of ways.

24 Obviously, you have the power to find
25 Mr. Cooper in contempt. There was an order, he did

1 not obey it. You also have we think the power to
2 determine not to if you should decide that in the
3 exercise of your discretion you think you need not or
4 ought not do that. We have devoted as you've seen
5 most of our brief, almost all of our brief, to what
6 happens if you should decide to hold Mr. Cooper in
7 contempt.

8 And we really said broadly two sorts of
9 things which I would preface by just saying this. I
10 want to be clear that I don't represent a criminal
11 defendant here today. This is a civil contempt
12 proceeding against someone that's never been in
13 trouble and that has only and honorably served the
14 public by his journalistic efforts, that he finds
15 himself in a situation in which his journalistic
16 commands at their best are at least at tension with
17 and perhaps in conflict with Your Honor's rulings.

18 And so his answer and our answer is we
19 intend to appeal. And the only way we can appeal is
20 for the, the witness to decline to answer the question
21 as he has attested to today. We thought hard and then
22 learned what the law was about whether we could even
23 ask you to certify this without a finding of contempt
24 and we can't, so that option is simply not open.

25 So the bulk of our argument then was and is

1 that this case should in a sense be teed up for the
2 Court of Appeals. We have agreed as you've seen in
3 the paper if Your Honor were to order incarceration
4 that counsel have agreed on bail and therefore that he
5 would not now be incarcerated. And that a schedule
6 would be advocated by me to the Court of Appeals which
7 should result in a prompt disposition by that court
8 basically.

9 The stipulation that we've agreed to is that
10 if you were to find him in contempt and order
11 incarceration today I'm sure that the same thing with
12 somewhat different words would apply with respect to a
13 fine is that I would move by Tuesday, I would file a
14 notice of appeal by Tuesday and move on that day for
15 an expedited appeal seeking a briefing schedule where
16 we would file our brief in 12 days after the Court of
17 Appeals entered the order. They would file theirs
18 seven days thereafter. We would file our response
19 three days thereafter and then whatever argument the
20 Court of Appeals set would then occur.

21 The burden of what I have to say to you
22 today if you should hold him in contempt that you
23 ought to do what we think most judges have done which
24 is to impose a fine rather than incarceration.
25 Obviously, if it's stayed, if it's a fine I guess the

1 word is stay. And if it's incarceration the word is
2 bail as I understand it, but it amounts to the same
3 thing. If it is stayed or bail is agreed upon as
4 counsel have then the practice truth there wouldn't be
5 difference between the imposition of the sanction if
6 you weren't opposing it.

7 But we have seen that in cases which raise
8 this very issue involving journalists, again and again
9 District Courts have and when they haven't the Court
10 of Appeals have not only granted the stay but imposed
11 some modest fine often a dollar a day. Counsel for
12 the, Special Counsel has argued that that would be a
13 symbolic fine. That's true. A dollar a day is
14 nothing but a symbolic fine. Obviously if we were to
15 lose in the Court of Appeals Your Honor could revisit
16 the issue of the amount of the fine or incarceration
17 if it comes to that.

18 The reason I think I cannot tell you the
19 other courts that have done this have explained why
20 they did a dollar a day. But the reason they've done
21 a dollar a day I believe is a different sort of
22 symbolism. And that is that they understand win or
23 lose whatever the law may turn out to be when
24 journalists act in good faith consistent with their
25 professional norms and indeed consistent with some

1 significant body of case law albeit one that judges
2 have sometimes rejected as you have, that they ought
3 not to be incarcerated. And that if the Court of
4 Appeals can have before it the case in that same form
5 with a fine, and a small fine that that should be
6 done.

7 Now the argument has been made by Special
8 Counsel that our cases are not Grand Jury cases.
9 Section 1826, of course, relates to trials and Grand
10 Jury. There's no difference there.

11 THE COURT: Right.

12 MR. ABRAMS: And they've argued that many of
13 our cases don't involved individual journalists as
14 opposed to corporate entities like Time, but the
15 Cutler case does indeed involve individual journalists
16 as well as corporate entities. And there was a gross
17 fine there of a dollar a day. I think the reality is
18 a lot of judges recognize this is a hard question.
19 And that it is not by any means nullable in advance
20 what the Court of Appeals may do.

21 So we ask you then to impose a fine rather
22 than to order incarceration. We certainly ask you to
23 accept the stipulation of counsel whatever you do with
24 respect to fine or incarceration, and that we'd be as
25 it were sent on our way upstairs to see what happens.

1 I think all of us understand that and
2 Mr. Cooper understands the importance of abiding by
3 law. He is not a law breaker. He's not a
4 contumacious person. To have this case heard on
5 appeal he simply has to take the step that he has
6 announced today. And so on that basis we urge the
7 Court to act as I have urged on you today. Thank you,
8 Your Honor.

9 THE COURT: Thank you, Mr. Abrams.
10 Appreciate the work. Mr. Fitzgerald.

11 MR. FITZGERALD: Yes. Good morning, Your
12 Honor. Let me just make sure that Your Honor --
13 first, I apologize. Our brief was served Monday, but
14 wasn't filed Tuesday because of some delays. And
15 secondly, I hope I made clear I understood when we
16 filed Monday that Mr. Abrams would file Wednesday or
17 Thursday. Lastly, I want to make sure you received
18 our brief yesterday.

19 THE COURT: Got it.

20 MR. FITZGERALD: Okay. To be perfectly,
21 Your Honor, blunt we're trying to strike a balancing
22 ourselves. We recognize that there are important
23 First Amendment media interests and there also are
24 very important investigative interests. And in
25 looking at the situation Mr. Cooper is not being

1 investigated for any wrongdoing. He's being
2 questioned as a witness for doing his job. And at a
3 certain point we feel the law is clear that he has to
4 comply with the lawful obligations. And we think that
5 Your Honor was right on the law. And we think also
6 that as a matter of fact, we've exceeded whatever
7 standard we need to satisfy to show that his testimony
8 is necessary.

9 Having said that, I don't want to be in a
10 position of asking Your Honor to do something that we
11 don't think is appropriate. We understand that
12 Mr. Cooper and Time magazine in this case wants to
13 make sure that D.C. Circuit Court of Appeals agrees
14 with Your Honor. And so what we're trying to do is
15 accommodate that important interest, accommodate his
16 right to be heard and Time's right to be heard, and
17 the D.C. Circuit's opportunity to review this decision
18 while not prejudicing our investigation.

19 We'd like to move this forward. And we do
20 not wish to see Mr. Cooper sit in jail for vindicating
21 a right however strongly we disagree with his legal
22 view. We want to make sure that everyone we
23 understand that this is a proper procedure. And so
24 what we discussed with Mr. Abrams was putting
25 ourselves in a position where we're not prejudiced

1 time wise and Mr. Cooper doesn't suffer in jail to
2 have heard by the Court.

3 So looking past what is a legal standard
4 without getting to our view that we think we're
5 clearly right on the law, what we wanted to do is be
6 in the same position as if Mr. Cooper was jail without
7 him being there. That's why -- and I think the, one
8 thing I want to make clear we understood that
9 Mr. Abrams would file a notice of appeal within 48
10 hours, but that means two business days. Our paper
11 said Monday, we meant Tuesday if Your Honor had
12 entered an order today. Then thereafter the schedule
13 would be as if it would be resolved in 30 days as the
14 statute provides if someone is in jail.

15 The one thing I think I need to straighten
16 out with Mr. Abrams, I understood that we would
17 propose an order where their brief would be filed
18 within 12 days of the notice of appeal. It wouldn't
19 wait for 12 days for the D.C. Circuit to order the
20 schedule because that would lose some time. Getting
21 past the scheduling matter we think that would be the
22 fair balance that would allow us to proceed. We're
23 relying upon that to take the position that this is
24 not an appeal taken for delay. We think that's the
25 proper balance to say.

1 Having said that, I think it's very
2 important that the penalty imposed for contempt do be
3 jail, should be jail. Because I think a fine would
4 diminish the seriousness of the proceeding. Jail is
5 not a punishment for something that Mr. Cooper has
6 done in the past. It's coercion. This is not an
7 economic dispute. Mr. Cooper is not taking the
8 position he is over money. It's a principled position
9 in his mind, one with which we disagree. But at the
10 end of the day if the D.C. Circuit agrees with Your
11 Honor that he's obligated to testify and that the law
12 requires that and the facts require it, that we need
13 his testimony then an economic fine will not compel
14 that.

15 So I think by Your Honor holding Mr. Cooper
16 in contempt and indicating that the punishment is jail
17 not a monetary fine that shows the seriousness of the
18 proceeding. At the same time if we stay Mr. Cooper
19 being in jail for an expedited schedule for the
20 appeal, I think we accomplished what we all want to do
21 which is to make sure we're all right on the law and
22 that D.C. Circuit reviews it and that we can proceed
23 in a timely fashion. I hope the record is clear from
24 the D.C. Circuit that we're taking that view because
25 we want to see this done appropriately, but we do want

1 to move with all deliberate dispatch.

2 And I would point out that the cases and
3 Mr. Fleissner is more familiar with the cases
4 generally. I was flying while the brief was served.
5 From my understanding the cases don't involve Grand
6 Jury matters. They involve civil matters. And I
7 think at the end of the day if the D.C. Circuit agrees
8 that this is a validly issued Grand Jury subpoena the
9 only appropriate remedy to make that Mr. Cooper does
10 testify would be jail.

11 THE COURT: All right. One footnote is that
12 in the brief of the Respondent here they suggests that
13 my original ruling be made public at this time along
14 with all papers in connection with this motion. And
15 any decision or oral argument or decision in this
16 motion. In fact, that the papers do not disclose any
17 details of the Grand Jury investigation. You all want
18 my issue on that or not. I've already talked about
19 publishing my opinion on Monday which I intend to do.
20 I haven't heard any objection to that from the people
21 involved. As to the papers in this motion --

22 MR. FITZGERALD: If I could say this, Your
23 Honor and I'll have Mr. Fleissner, my lawyer, correct
24 me if I'm wrong which he should do. My understanding
25 generally is that even though it's a Grand Jury

1 matter, contempt matters are often made public. I
2 don't believe we've said anything in our papers that
3 would reveal the operation of the Grand Jury on the
4 contempt.

5 And not having read Mr. Abrams' papers I can
6 rely upon Mr. Fleissner who has read them this morning
7 and Mr. Abrams that there's nothing in there, that the
8 contempt papers we believe the motion -- all the
9 papers filed with regard to contempt could be made
10 public. We would obviously oppose the initial papers
11 concerning the motion for the reasons we set forth
12 before.

13 THE COURT: Your attachments?

14 MR. FITZGERALD: Exactly.

15 THE COURT: I understand that.

16 MR. FITZGERALD: And the prior hearing which
17 I think would refer back to matters that were treated
18 in confidence for purposes of litigation. That would
19 then leave the simple question of whether or not Your
20 Honor's opinion and order should be released today
21 versus Monday. And on that we had moved in Monday on
22 part on the agreement that counsel would not object.
23 They have a right to change that so I have no
24 complaints. And so the only question is the
25 difference between Friday and Monday. If I can just

1 talk to my co-counsel for a second.

2 THE COURT: Yeah, that's fine. We had
3 talked about releasing it Monday. I had not
4 considered releasing it today. I thought Monday was
5 the understanding. I gave everybody Monday to reject.
6 If I hadn't heard by then I would release the opinion.

7 MR. FITZGERALD: Is Your Honor's intent to
8 release it on Monday or today?

9 THE COURT: Monday.

10 MR. FITZGERALD: Okay. We would consent.

11 MR. ABRAMS: On that single point, Your
12 Honor, I think that it would be well if you are going
13 to release the proceedings about today that if they're
14 available on Monday that perhaps you would release
15 them all at once. Just among other things it would be
16 very difficult for us to, you know, answer questions
17 to the world about what happened next if, unless
18 they're both delivered to the world in the same
19 package if that could be accomplished.

20 THE COURT: I would intend to release the
21 papers in connection with this motion and that, and
22 then the original order and the opinion I did on July
23 20th at the same time. It says, "All papers in
24 connection with this motion." There was some ex parte
25 filing by the government originally perhaps affidavits

1 I would not released.

2 MR. ABRAMS: I'm sorry, "by this motion," I
3 meant the order to show cause.

4 THE COURT: Yeah, that's no problem. Your
5 briefs that you filed I received and the order so
6 forth.

7 MR. ABRAMS: That would just be the briefs
8 and a transcript of any of the oral argument.

9 THE COURT: That's fine.

10 MR. ABRAMS: Thank you.

11 MR. FITZGERALD: Your Honor, one other
12 matter I forgot to address is we were hoping to
13 address also the corporate entity Time, Inc. in terms
14 of contempt. My understanding is that the corporate
15 entity would refuse to comply.

16 THE COURT: That came in yesterday. Let me
17 hear from Mr. Abrams that they were ready to address
18 that. I did get the motion to quash I think came in
19 yesterday.

20 MR. ABRAMS: In all candor, Your Honor, the
21 motion to quash is essentially a repetition for the
22 record of the argument we had made to you previously.
23 Indeed, it refers back to the earlier arguments. We
24 had thought that, and I think Special Counsel agrees
25 with this, that it would be appropriate for both

1 matters to be considered by the Court of Appeals at
2 the same time.

3 I think the reason we shored the subpoena
4 was given one day's notice actually and that we extend
5 it a few days. Ordinarily, I would argue to you that
6 in a situation in which you haven't even entered an
7 order to show cause I shouldn't have another client in
8 contempt. But in all candor there's not a lot of new
9 news in our papers to you on the, on behalf of Time.

10 So, so long as there's an understanding that
11 applies to Time of the same sort that we've reached
12 with respect to Mr. Cooper not involving incarceration
13 of course, but involving a stay of whatever penalty
14 Your Honor imposes, if any, and on the same terms then
15 we don't have any problem with Your Honor ruling
16 similarly with whatever other ruling you may reach
17 today. As I said the reason we were obliged to file
18 that is we had a Grand Jury subpoena. And we either
19 had to comply with it or file a motion with respect to
20 it.

21 THE COURT: All right. Thank you. And Time
22 is represented here today?

23 MR. ABRAMS: Yes.

24 THE COURT: All right.

25 MR. FITZGERALD: Your Honor, we would agree

1 to a stay on any contempt proceeding on Time Inc.
2 Obviously it would be a fine. I would not like a
3 nominal fine, but if it expedites things I know if we
4 can have a fine that we can agree upon the amount to
5 be determined later or pick a number that's neither
6 low nor high and argue it later.

7 I guess technically, we should have, if Your
8 Honor denies the motion to quash have Time refuse to
9 comply with the subpoena pending appeal and then we
10 can brief both matters with the same schedule. And
11 then if Your Honor unsealed on Monday the relevant
12 papers we would like the motion to quash the subpoena
13 to be treated like a prior motion to quash and remain
14 sealed since it contains Grand Jury matters but the
15 discussion of this contempt would be open.

16 THE COURT: Let me just look at this.

17 MR. ABRAMS: My only interest in this Your
18 Honor is clarity. And instead of frankly putting you
19 in the position of having to work this out with us
20 today or this morning it just seems to me that when
21 Your Honor is prepared to enter whatever order or
22 orders you enter that they should be basically
23 consistent and that they could be entered at the same
24 time, but probably would take two separate orders.

25 THE COURT: Yeah. Okay. Seems to me we

1 have to do, review this a little bit more but as to
2 the second issue a motion of Time to quash subpoena
3 protective order I just read through it again and as
4 Mr. Fitzgerald has ably and candidly told the Court
5 represent arguments that I've already considered in
6 Mr. Cooper's issue is deny that motion to quash and
7 for protective order by Time Inc. And order them to
8 comply with the subpoena. In failing to do so would
9 be subject to contempt. And as I understand it Time
10 magazine will not comply with the order to compel them
11 to testify and provide information and documents as
12 the subpoena requests which I think is attached to
13 Exhibit one of their motion.

14 Date and time is August 4th of the Grand
15 Jury proceedings where Time is commanded to bring
16 notes, tape recordings, e-mail and other documents of
17 Matthew Cooper in regard to the subject matter in this
18 investigation. And that therefore, Time's motion to
19 quash having been denied they could be compelled to
20 produce those documents. As I understand the
21 representations today they would not do so but be in
22 the same position as Mr. Cooper is today.

23 MR. ABRAMS: Yes, that's correct, Your
24 Honor.

25 THE COURT: And therefore I would enter an

1 order as the same. I think I would enter a written
2 order to that effect and then enter an order holding
3 them in contempt if that is the reality they are
4 refusing to comply with the subpoena that I have now
5 ordered to be satisfied.

6 MR. ABRAMS: Just so the record is clear,
7 Your Honor, the reason for that is the same claims of
8 confidentiality that we have made previously to you.

9 THE COURT: Thank you. I see a marshal has
10 come in the courtroom. Don't be too nervous,
11 Mr. Cooper. You do have your toothbrush with you?
12 All right. I'm ready to go ahead and rule on these
13 matters.

14 In recognizing the seriousness of these
15 issues that my ruling interpreting Branzburg from the
16 Supreme Court and its progeny in the Grand Jury
17 context at least established to the Court's
18 satisfaction there is no First Amendment right to
19 reporter's privilege, while recognizing in other
20 context perhaps certain civil or even criminal cases
21 as witnesses. There has been some perhaps balancing
22 done by following Justice Powell's concurrence that
23 seems to have watered down somewhat Justice White's
24 opinion in Branzburg it seems to me.

25 But the reading I got in the Grand Jury

1 context is that I ruled on July 20th and nothing it
2 seemed to me to change that which has been submitted
3 since then. I'm satisfied under the recalcitrant
4 witness statute 28 U.C.S. 1826 that as a witness
5 before a Grand Jury has refused without just cause to
6 comply with an order of the Court to testify, the
7 Court refuse to be brought to its attention which it
8 now has summarily ordered his confinement in a
9 suitable place until such time the witness is willing
10 to give such information and provide such information.

11 The Court has the discretion of using
12 criminal or civil contempt obviously to address the
13 violation of its order. And Mr. Cooper has stated he
14 has violated the Court's order and will not obey it
15 and I make such a finding. In Re Investigation before
16 April 1975 Grand Jury at 531 F.2nd at 608, a D.C.
17 Circuit case from '76, recognized that the Court can
18 go either civil or criminal contempt. Criminal
19 contempt is 18 U.S.C. 401 and 402.

20 But the cases suggest that normally the
21 Court should consider the feasibility of coercing
22 testimony through the imposition of civil contempt and
23 should only resort to criminal contempt after it
24 determines that the remedy, any civil remedy would be
25 inappropriate, perhaps ineffectual, that's Shillitani

1 versus U.S. at 384 U.S. 371 Footnote nine.

2 The Court is going to go by way of civil
3 contempt in this matter. And I can order a fine or
4 order imposition of confinement until the witness
5 agrees to provide the requested testimony. I do not
6 think it would be appropriate not to issue any order
7 and to waive any penalties in this matter because
8 Mr. Cooper has refused to obey the order of the Court
9 and now Time magazine as well.

10 I don't know the length of this Grand Jury
11 whether it's going to be extended or not. And the
12 timing is a concern to the government because the
13 statute provides he can be held only during the length
14 of the service of the Grand Jury as a maximum. But
15 looking at the issues in this case it's clear to the
16 Court as a matter of principle and it is not one of in
17 any way of attempting to frustrate the rule of the law
18 but to have the appropriate legal authorities rule
19 upon this in a more final fashion in the District
20 Court.

21 So what the Court will do at this time I'm
22 going to find Mr. Cooper in contempt and Time magazine
23 based upon the oral orders I've issued now and the
24 rulings I've made which will be put forth in a written
25 order for its failure to respond to the subpoena that

1 is, I've upheld and ordered them to do based upon
2 their representation of counsel, corporate counsel as
3 well as Mr. Abrams states that Time magazine will also
4 not comply with the Court's order. Find them in
5 contempt of court, civil contempt of court under 28
6 U.C.S. 1826, and apply the following rule to attempt
7 to address the violation of this order and compel the
8 testimony through the imposition of this civil
9 contempt.

10 The Court will first confine Mr. Cooper at a
11 suitable place until the witness agrees to provide the
12 requested testimony. And the confinement will last no
13 longer than the term of the Grand Jury or 18 months
14 whichever is shorter. The Court will suspend that
15 confinement pending the appeal of this case and grant
16 a stay finding that there's substantial legal
17 questions involved that the contempt is a matter of
18 principle and not being contemptuous quote to the
19 Court because of the refusal to answer the questions
20 in light of Mr. Cooper's belief that the law provides
21 the privilege to him not to provide off-the-record or
22 confidential information from sources in his field as
23 a reporter and the First Amendment protections that he
24 has.

25 And that it is important for the appellate

1 process to go forward quickly because of the nature of
2 the investigations, the Grand Jury investigations with
3 limited time frame. The government's established in
4 its various proceedings before this Court that it is
5 necessary to proceed this way. They have done all
6 other efforts they can do to get this information from
7 other individuals and have not been able to finally
8 make the determinations they need to make to proceed
9 in this case without this information. And it is a
10 matter of time because they have basically indicated
11 they have finished much of their investigation except
12 for these matters involving reporters and their
13 employers to provide the last information they need to
14 close this investigation one way or another.

15 I will not go any further in details about
16 that. The record will be clear to the Court of
17 Appeals, I believe. I'm not finding Mr. Cooper has
18 not been acting in good faith, but these are a matter
19 of professional conscience. And therefore, I think
20 the stay of his imprisonment is appropriate until such
21 time as the Court of Appeals rules as long as they
22 move this matter expeditiously and not delay the case
23 undue amount of time so that the investigation would
24 be harmed.

25 And it's certainly in the public interest to

1 certify the entry of the stay given the serious First
2 Amendment issues in this case and any potential
3 chilling effect which contempt sanctions will have on
4 reporters working on matters of public interest and on
5 their employers such as Time magazine.

6 And I agree with the parties that public and
7 the criminal process in a Grand Jury both will be well
8 served by having legal issues in this case
9 conclusively resolved before any contempt sanction is
10 effected against Mr. Cooper. One has been granted now
11 but not effected.

12 So for those reasons this will be a bench
13 opinion of the Court. And that I will stay the
14 contempt penalties against Mr. Cooper pending
15 determination of the First Amendment issues raised in
16 this case by the D.C. Circuit. And additionally, as
17 to Time magazine I will issue a monetary fine on a
18 daily basis. Couple of cases I have here, on a daily
19 basis of one thousand dollars a day which is more
20 symbolic of a penalty to a large corporate enterprise
21 like Time magazine. But it does provide a contempt
22 citation against them as a vehicle there for them to
23 appeal this finding of contempt refusing to comply
24 with the Grand Jury subpoena to provide the necessary
25 testimony/documentary evidence as required by my court

1 order today. Relying upon my original memorandum
2 opinion of July 20th, 2004.

3 As to Mr. Cooper, he'll be granting personal
4 recognizance bail today so that he will be released
5 unless the parties have some understanding of the
6 situation. It seems to me he should be put on
7 personal recognizance with no conditions other than
8 remains available depending on what happens with the
9 Court of Appeals. There should be no other conditions
10 upon him.

11 I would like the government to propose, to
12 file an order incorporating these findings that also
13 have been reviewed by Mr. Abrams before it is entered.
14 And I would like it provided to me this afternoon so
15 that I may go ahead and issue this as soon as
16 possible. And then issue my opinions and the briefs
17 for today's hearing, order to show cause to be
18 released to the public Monday morning. All right,
19 Mr. Abrams.

20 MR. ABRAMS: Your Honor, the only thing I
21 didn't hear you may have said you are staying the
22 penalty imposed on Time as well as on Mr. Cooper.

23 THE COURT: I did not say that. I meant to,
24 thank you, yes. The Time magazine penalty of a
25 thousand dollars a day will be stayed pending the

1 appeal as well finding the same factors and granting a
2 stay apply to Time magazine and the public interest as
3 well in the nature of this case. And the expedited
4 appeal process and the significant legal issues that
5 need be decided all will take a favor of granting a
6 stay of Mr. Cooper's penalty but also Time magazine.

7 MR. FITZGERALD: Lastly, judge, I take it
8 the order should also provide that the, while the
9 motion to quash, the papers filed with regard to the
10 motion to quash shall remain sealed except for the
11 ordered opinion, that the papers concerning the motion
12 for contempt will be unsealed. And that today's
13 proceeding will be unsealed, but the argument on the
14 motion to quash will remain sealed.

15 THE COURT: Yes, the motion to quash will
16 remain sealed.

17 MR. FITZGERALD: To be even more clear the
18 motion to quash with regard to Mr. Cooper would remain
19 sealed since we discussed sensitive matters, but since
20 today I think we were careful the motion to quash with
21 regard to Time, Inc. can be I believe unsealed.

22 THE COURT: All right. That's fine. I
23 think I would also want separate orders from Time
24 magazine denying the motion to quash; of course, my
25 oral ruling this morning and refusing to answer the

1 subpoena at that point and them being held and now
2 held in contempt. I think there should probably
3 separate orders done.

4 My clerk had brought up a good point. The
5 motion to quash for Time attaches the motion to quash
6 of Mr. Cooper's, and the, aside from briefing the
7 affidavit of Mr. Cooper and Mr. Abrams's affidavit.
8 In other words, you basically have just a two page
9 cover argument and then attaches what has already been
10 filed.

11 MR. FITZGERALD: Perhaps I confused everyone
12 --

13 THE COURT: So that we release that and I'm
14 releasing Mr. Cooper's motion.

15 MR. FITZGERALD: What I meant to say which
16 is not what I said was that the papers with regard to
17 all the motions to quash will remain sealed and just
18 that the entire proceedings today, the argument oral
19 could be unsealed even though it makes reference to
20 the motion to quash.

21 THE COURT: But not the actual motions to
22 quash?

23 MR. FITZGERALD: Exactly.

24 THE COURT: I misunderstood.

25 MR. FITZGERALD: No, I misspoke. Thank you.

1 THE COURT: The other thing is I don't know
2 what capabilities you have here in town. Can you
3 submit a written order also in written as well as a
4 disc form in case I want to make any changes to it?
5 It would be easier for me.

6 MR. FITZGERALD: Yes, sir.

7 THE COURT: Finally as to the bond for
8 Mr. Cooper, I think it would probably be enough
9 because the bond forms that we have are all criminal
10 bond forms. This is a civil contempt. If he just
11 supplies the Court with his name and address and I'll
12 put down a condition. And I'll do a short order just
13 saying he's released on his personal recognizance. He
14 promises to reappear as required by the Court or the
15 parties or the government at an appropriate time and
16 place once the case is decided by the circuit and
17 leave it at that and have Mr. Cooper sign off on that
18 as well.

19 MR. FITZGERALD: We certainly agree. We
20 don't see any need to have Mr. Cooper processed in any
21 fashion.

22 THE COURT: This should not be in the order.

23 MR. FITZGERALD: And we certainly agree to
24 personal recognizance.

25 THE COURT: All right.

1 MR. ABRAMS: You want his name and address
2 on the record now, Your Honor?

3 THE COURT: Yes. And Mr. Cooper, you around
4 here? Are you from here or New York?

5 THE WITNESS: I live here in Washington.

6 THE COURT: All right. You may have to come
7 by and sign this form when I dictate it this afternoon
8 or Monday or some time that's convenient.

9 THE WITNESS: Sure.

10 THE COURT: Would you take down his name and
11 address.

12 THE WITNESS: I'm scheduled to be out of
13 town next week, but so it's possible to do it today.

14 MR. ABRAMS: You want to use your office
15 address? Is that satisfactory?

16 THE COURT: Yes.

17 MR. ABRAMS: Why don't you give your name
18 and office address.

19 THE WITNESS: Sure. My name is Matthew
20 Cooper. My office address is Time magazine, 555 12th
21 Street, Northwest, Suite 600, Washington, D.C. The
22 zip code is 20004.

23 THE COURT: All right. I'll dictate a short
24 order for that. You'll be here for another half hour
25 so you can come by and sign the order.

1 THE WITNESS: Thank you, Your Honor. I
2 appreciate that. Phone is 202 861-4046.

3 MR. FITZGERALD: Thank you, judge. We
4 appreciate your seeing us on short notice with the
5 trial underway.

6 THE COURT: Thank you all for coming in. I
7 appreciate it. I'll get that first order out. And
8 I'll wait for the government to submit the other ones.
9 Monday morning we'll release the order so that Time
10 can talk to its constituency about this.

11 [Thereupon, the proceedings adjourned at
12 10:46 a.m.]

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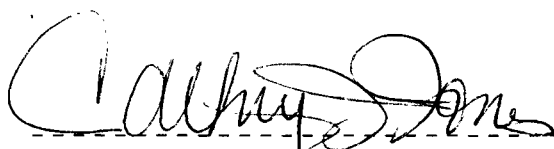
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CERTIFICATE

I, Cathryn J. Jones, an Official Court Reporter for the United States District Court of the District of Columbia, do hereby certify that I reported, by machine shorthand, the proceedings had and testimony adduced in the above case.

I further certify that the forgoing 36 pages constitute the official transcript of said proceedings as transcribed from my machine shorthand notes.

In witness whereof, I have hereto subscribed my name, this the 16th day of August, 2004.

A handwritten signature in cursive script, appearing to read "Cathryn Jones", written over a horizontal dashed line.

Cathryn J. Jones, RPR
Official Court Reporter